STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS
Division of Workers' Compensation

FINAL STATEMENT OF REASONS

Subject Matter of Proposed Amendments to Regulations: Workers' Compensation – Health Care Organizations

A. UPDATE OF INITIAL STATEMENT OF REASONS AND INFORMATIVE DIGEST

Pursuant to Government Code Section 11346.9(b), the Administrative Director of the Division of Workers' Compensation (hereinafter "Administrative Director") incorporates the Initial Statement of Reasons prepared in this matter.

1. MODIFICATIONS TO THE PROPOSED REGULATORY TEXT

The proposed amendments to the following section were modified after the public hearing in this matter:

Section 9779.4 – DWC Form 1194:

Labor Code Section 4600.3(a)(1) requires that every employee shall be given an affirmative choice at the time of employment and at least annually thereafter to designate or change the designation of an HCO or a personal physician, personal chiropractor, or personal acupuncturist. The choice must be memorialized in writing and maintained in the employee's personnel records. The employee who has designated a personal physician, personal chiropractor, or personal acupuncturist may change their designated caregiver at any time prior to the injury. Any employee who fails to choose between health care organizations or to designate a personal physician, personal chiropractor, or personal acupuncturist may be enrolled in the HCO selected by the employer.

1) In response to a suggestion made during the public comment period, a reference to predesignation of a personal acupuncturist as an alternative to enrolling in an HCO or predesignating a personal physician or personal chiropractor was added wherever the form refers to the employee's right to predesignate a personal physician or personal chiropractor. Labor Code Section 4600.5(c) provides that an employee has the right to predesignate a personal acupuncturist as an alternative to predesignating a personal physician or a personal chiropractor or enrolling in an HCO.

2) In response to a suggestion made during the public comment period, a space was added to the portion of the second page of the form where the employee can predesignate a personal physician, personal chiropractor or personal acupuncturist to require the employee to provide the telephone number for their designated personal physician, personal chiropractor or personal acupuncturist.

3) To improve the clarity and consistency of the form, the word "personal" was added before the word "chiropractor" wherever the word "chiropractor" appears in conjunction with the terms "personal physician" and "personal acupuncturist."

4) The form was also nonsubstantively revised after the comment periods to add the effective date of the revised version of the form to the form name - "DWC Form 1194: Front (Rev. 1/03)" and "DWC Form 1194: Back (Rev. 1/03)."

2. WITHDRAWAL OF A PORTION OF THE PROPOSED REGULATORY PROCEEDING

The proposed amendment to the following section was withdrawn in its entirety to allow further study of the impact of such a change.

Section 9779.5 – Reimbursement of Costs to the Administrative Director; Obligation to Pay Share of Administrative Expense:

Existing Section 9779.3 requires all organizations certified as HCOs or WCHCPOs to pay an annual assessment to the Workers' Compensation Managed Care Fund representing that entity's share of the costs and expenses reasonably incurred in the administration of the HCO program.

The annual assessment may be paid in two equal installments, with the first payment falling due on or before July 1 and the second installment falling due on or before December 15.

The proposed amendment would have required the annual assessment to be paid in a single payment due on or before July 1.

The proposed amendment has been withdrawn in its entirety.

B. DETERMINATIONS CONCERNING LOCAL MANDATES

- Local Mandate: None. The proposed regulations will not impose any new mandated programs or increased service levels on any local agency or school district. The proposed amendments to not apply to any local agency or school district.
- Cost to any local agency or school district that is required to be reimbursed under Part 7 (commencing with Section 17500) of Division 4 of the Government Code: None. The proposed amendments do not apply to any local agency or school district.
- Other nondiscretionary costs/savings imposed upon local agencies: None. The proposed amendments to not apply to any local agency or school district.

C. CONSIDERATION OF ALTERNATIVES

The Administrative Director considered all the comments submitted during the two public comment periods, and, based on those comments, made modifications to some of the regulations as initially proposed. The Administrative Director has now determined that no alternatives proposed by the regulated public or otherwise considered by the Administrative Director would be more effective in carrying out the purpose for which these regulations were proposed, nor would they be as effective as and less burdensome to affected private persons and businesses than the regulations that were adopted.

D. SUMMARY OF COMMENTS RECEIVED AND RESPONSES THERETO CONCERNING THE REGULATIONS ADOPTED

The comments of each organization or individual are addressed in the following charts as they relate to each section of the regulations as proposed and as finally adopted.

The two public comment periods were as follows:

Initial 45-day comment period on proposed regulations:

July 26 through September 13, 2002.

15-day comment period on modifications to proposed text:

October 7 through October 23, 2002.

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ADDENDUM TO FINAL STATEMENT OF REASONS

Subject Matter of Proposed Amendments to Regulations: Workers' Compensation – Health Care Organizations

The following information is added to the Final Statement of Reasons dated November 1, 2002, contained in Item N of the Rulemaking Record.

MODIFICATIONS TO THE PROPOSED REGULATORY TEXT

Further Information Regarding Necessity for Deletion of Regulatory Text

Section 9779.3

Section Deleted: Subdivision (a)(4):

This subdivision established a requirement that if one of the HCOs offered by an employer was owned or controlled by that employer, the information to be provided to the employee pursuant to subdivision (a)(3) would include information explaining the nature of any material and significant differences between the HCOs that would allow the employee to make an informed choice between the HCOs. The subdivision also defined "control" for purposes of the section.

Specific Purpose of Deletion:

This entire subdivision is being deleted to eliminate the requirement that an employer provide information on material differences between multiple HCOs offered by the employer where the employer owns or controls one of the HCOs.

Factual Basis That Amendment Is Necessary:

AB 749 (Calderon, 2001-2002, Statutes 2002, Chapter 6, Section 61), effective January 1, 2003 will repeal the requirement that an employer desiring to use an HCO must contract with at least two HCOs from which the employee may choose. The purpose of subdivision (a)(4) was to ensure that an employee would be given information about "material and significant differences between the HCOs" where the employee was choosing between two or more HCOs, at least one of which was owned or controlled by the employer. The subdivision was necessary since the employee would always be choosing *between* HCOs. Under the statute as revised by AB 749, an employer is not required to offer a second HCO and it is envisioned that normally only one HCO will be offered. The subdivision is not necessary because under the usual circumstance the

employer will offer only one HCO and the language requiring provision of "material and significant differences between HCOs" will be irrelevant. To the extent that an employer offering one HCO owns or controls that HCO, this fact will be disclosed to the employee pursuant to subdivision (a)(3)(ii).

NONSUBSTANTIVE MODIFICATION OF TEXT OF REGULATIONS AFTER SUBMISSION OF TEXT TO OAL ON 11/22/02

Section Amended: Section 9779.3

Subdivision (b) of Section 9779.3 is the regulatory text that specifies that an employee shall designate their enrollment in an HCO or alternatively their pre-designation of a personal physician or chiropractor on the form DWC 1194 (which is codified in Section 9779.4). Labor Code Section 4600.3(a)(1) states in pertinent part that: "Every employee shall be given an affirmative choice at the time of employment and at least annually thereafter to designate or change the designation of a health care organization or a personal physician, personal chiropractor, or personal acupuncturist. The choice shall be memorialized in writing and maintained in the employee's personnel records."

Subdivision (b) submitted to OAL with the Form 400 on November 22, 2002 stated:

"(b) Employees shall designate their enrollment option on form DWC 1194. This form must be maintained in the employee's personnel file for a minimum of three (3) years, and be made available to the employee or employee's representative on request.

Employees who designate on form DWC 1194 that they do not wish to enroll in an HCO and wish to pre-designate their own personal physician or chiropractor shall ~~be given a form for such pre-designation by the employer within 3 working days of receipt by employer of~~ pre-designate that physician or chiropractor on the form 1194. At least once each year the employer shall provide the employee with a notice informing the employee of his or her right to continue as an enrollee of ~~an~~ the HCO, change to another HCO if another HCO is offered by the employer, or designate the employee's own physician instead of ~~an~~ the HCO. If another HCO is offered by the employer and the employee chooses to change to another HCO or if the employee chooses to designate a personal physician, the employee shall designate such choice on a form DWC 1194, which shall be provided by the employer."

In order to make this regulation conform to the statute, the DWC has made nonsubstantive changes to the text to indicate that the employee wishing to designate a personal physician, personal chiropractor or personal acupuncturist shall use the DWC 1194 to do so. The changes also make this section consistent with Section 9779.4. These nonsubstantive changes adopted after the text was submitted to OAL on 11/22/02 are indicated in double underscoring as set forth below.

Nonsubstantive change adopted - Section 9779.3 (b):

"(b) Employees shall designate their enrollment option on form DWC 1194. This form must be maintained in the employee's personnel file for a minimum of three (3) years, and be made available to the employee or employee's representative on request.

Employees who designate on form DWC 1194 that they do not wish to enroll in an HCO and wish to pre-designate their own personal physician or personal chiropractor or personal acupuncturist shall ~~be given a form for such pre-designation by the employer within 3 working days of receipt by employer of~~ pre-designate that personal physician or personal chiropractor or personal acupuncturist on the form 1194. At least once each year the employer shall provide the employee with a notice informing the employee of his or her right to continue as an enrollee of ~~an~~ the HCO, change to another HCO if another HCO is offered by the employer, or designate the employee's own personal physician , personal chiropractor or personal acupuncturist instead of ~~an~~ the HCO. If another HCO is offered by the employer and the employee chooses to change to another HCO , or if the employee chooses to designate a personal physician, personal chiropractor or personal acupuncturist, the employee shall designate such choice on a form DWC 1194, which shall be provided by the employer."

Section Amended: Section 9779.4

This section sets forth the DWC Form 1194 that is used for an employee's annual enrollment in an HCO or an employee's designation of a personal physician, personal chiropractor, or personal acupuncturist. The adopted amendments submitted to OAL by cover letter dated November 22, 2002 have been further modified to adopt a non-substantive change to the last sentence on the front of the DWC Form 1194. This change is to add the adjective "personal" before the words "physician", "chiropractor" and "acupuncturist". Also, the front of the Form 1194 submitted to OAL with the Form 400 on November 22, 2002 inadvertently omitted some formatting on the front of the Form 1194. This formatting has been added as follows: On the front, in the first line of the 4th paragraph the phrase "has offered you enrollment in an HCO" has been underlined as it is new text.

The adopted amendments submitted to OAL by cover letter dated November 22, 2002 have been further modified to adopt a non-substantive change to the third sentence on the back of the DWC Form 1194. This change is to add the adjective "personal" before the words "physician", "chiropractor" and "acupuncturist". This non-substantive change conforms the language to the provisions of Labor Code Section 4600.3(a)(1) which requires that the employee be given an affirmative choice at the time of employment and annually thereafter to designate an HCO or a personal physician, personal chiropractor, or personal acupuncturist. The non-substantive change has been made on the back of the Form 1194 is shown in double underline format in the following excerpt of the back of the Form:

MAKING YOUR CHOICE
For Workers' Compensation Health Care

Use this form to choose how you want to get medical care if you have a work-related injury or illness. You may choose ~~one of~~ the Workers' Compensation Health Care ~~Organizations~~ Organization offered by your employer, or you may designate your own personal physician, ~~or~~ personal chiropractor or personal acupuncturist. If you choose to designate your own personal physician, ~~or~~ personal chiropractor or ~~a~~ personal acupuncturist, you should do so in the space provided below ~~your employer will give you another form within three days~~. If you do not make one of these choices, your employer will ~~decide where you will~~ enroll you in the HCO in order for you to receive treatment for a work injury or illness.

The Form 1194, with corrected format on the front, and modified on the back to incorporate the above-described non-substantive changes, is attached to this Addendum and has been submitted to OAL in place of the Form 1194 that was previously submitted. The Form 1194, front and back, as attached to this Addendum has now been adopted by the Administrative Director in Section 9779.4.

FURTHER EXPLANTION OF FACTUAL BASIS FOR SECTION 9779 (b)

The text of new regulation Section 9779 subdivision (b) states that once a Knox-Keene Health Care Service Plan has complied with Section 9771 subsections (g)(1) and (2), the administrative director shall certify the organization as an HCO. The Initial Statement of Reasons, page 10 states that the new Section 9779 subdivision (b) will inform the regulated public that the Administrative Director has determined that compliance with Sections 9772 through 9778 of Title 8 is necessary for an HMO deemed an HCO to adequately provide medical services to injured employees. For clarity this part of the ISOR is supplemented here. Although the face of new subdivision (b) of Section 9779 does not mention Sections 9772-9778, it requires a Knox-Keene Health Service Plan to comply with 9771 subdivision (g)(1). Section 9771 subdivision (g)(1) mandates the Knox-Keene plan to demonstrate how the plan will satisfy the requirements of Sections 9772 through 9778.

FURTHER INFORMATION REGARDING NECESSITY FOR SECTION 9771(g)(1)

Section 9771 subdivision (g)(1) prescribes the documentation that a Knox Keene Health Care Service Plan must submit to the Administrative Director of DWC to show that it meets the requirements of Labor Code Section 4600.5(c). The $10,000 documentation processing and review fee for a Knox Keene Health Care Service Plan intending to become an HCO was determined after discussions with the Department of Managed Health Care (DMHC) and evaluating workload to conduct this review. DMHC has considerable archival material concerning each of its regulated Knox Keene-licensed plans. The legislature intended that DWC

utilize the materials "already on file with DMHC" to avoid duplicate submission and overlapping review between DMHC and DWC. After meeting with DMHC, DWC determined that in addition to the staff time needed to review primary documents concerning an Knox Keene Health Care Service Plan located at DMHC, DWC would need to conduct a review of additional primary source documentation concerning the provision of Occupational Medicine, Return to Work, Health and Safety and data reporting, aspects of an HCO that are unique to the Labor Code requirements for HCO certification. DMHC has nothing in its files concerning these operations.

DWC then estimated the workload for review of a Knox Keene Health Care Service Plan compared to a Workers' Compensation Health Care Provider Organization or a Disability Insurer applicant for HCO certification, for which an application fee of $20,000 has been established. The $10,000 fee represents our estimation of the amount sufficient to cover DWCs actual costs in conducting a Knox Keene Health Care Service Plan certification review, including the workload to request and review existing DMHC files (located in Sacramento and therefore involving staff travel from San Francisco) and the review of unique materials concerning the occupational medicine delivery aspects of a given HCO's operations. The HCO program is totally fee based and is not to be supported in any way by General Funds.

AMENDMENT TO RESPONSE TO COMMENT ATTACHED TO FSOR, PAGE TWO

On page two, the first full paragraph responding to comment by Mark Webb, American Insurance Association is superceded by the following paragraph which is a more detailed response.

"What the proposed language requires is that an applicant for certification as an HCO that is owned in whole or in part or controlled by a workers' compensation insurer or self-insured employer must demonstrate as a part of its application that its medical decision-making is free of financially motivated influence by the owning or controlling entity's claims function. The regulation further requires that the Medical Director have clear authority over medical decisions. The provisions are necessary to ensure that medical decisions are made by a person with medical training rather than by someone in the organization's claims function. These regulations carry out the statutory requirement embodied in Labor Code Section 4600(i)(7) that: 'The organization shall be able to demonstrate to the department that health care decisions are rendered by qualified providers, unhindered by fiscal and administrative management.'"

STATEMENT OF COMPLIANCE WITH LABOR CODE SECTION 4600.5(j) CONSULTATION REQUIREMENT

Labor Code Section 4600.5 subdivision (j) requires the Administrative Director to consult with interested parties including the Department of Managed Health Care and the Department of Insurance in the process of adopting the regulations to carry out the statute. [Note that the statute refers to "Department of Corporations", but pursuant to Health and Safety Code Section 1341.9 the Department of Managed Health Care became vested with the duties previously imposed on the Department of Corporations relating to health care service plans.] The DWC has consulted with interested parties, including the Department of Managed Health Care in adopting these regulations.

The DWC has consulted with the Department of Insurance on adoption of these regulations. This consultation was done after the rulemaking record was reopened on December 30, 2002. Item O is added to the rulemaking record. It contains correspondence to and from the Department of Insurance. The Department of Insurance has indicated it has no objection to the regulations.

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